Rogers Security Police, Inc. *and* **Elton Godwin.** Case 2-CA-18711

7 August 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 8 March 1983 Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended order as modified.

The judge found that the Respondent did not violate Section 8(a)(3) of the Act by discharging Godwin on 5 April 1982.[1] We find no merit in the General Counsel's exceptions to this finding. The judge further found that the Respondent violated Section 8(a)(1) of the Act 5 April by interrogating two of its employees (one of which was alleged discriminatee Elton Godwin) regarding how they voted in a mail-ballot election and by conditioning their reemployment on the success of a certain union in the election. In the absence of exceptions we adopt these conclusions. Finally, the judge concluded that the Respondent violated Section 8(a)(3) of the Act by failing and refusing to reemploy Godwin. We find merit in the Respondent's exceptions to this conclusion and, for the reasons set forth below, reverse the finding of the judge and dismiss the applicable complaint allegation.

The facts are fully set forth in the judge's decision. The Respondent had a collective-bargaining agreement with Local 238, Security and Protective Employees' Union, SEIU, AFL-CIO (Local 238), effective from 1 December 1981 through 31 December 1982. The contract covered only those employees of the Respondent providing security services at the Bronx Development Center (Center). The Charging Party (Godwin) commenced employment with the Respondent in August 1981 as a security guard at the center. About December 1981, the Brotherhood of Security Personnel Officers and Guards International Union (Brotherhood) filed a petition with the Board seeking to represent certain employees of the Respondent. Godwin signed an authorization card for Local 238 about September 1981 and one for the Brotherhood about December 1981. Based on timely objections to a secret-ballot election conducted in January 1982, a second election by mail-ballot was conducted from 22 March to 13 April 1982.

On 2 April the Respondent's president, Rogers, received a letter from an official of the Center requesting that Rogers terminate three employees, including Godwin, for allegedly engaging in various acts of misconduct at the Center. Rogers arranged a meeting on 5 April with Godwin and another implicated employee, O'Connor.[2] During the meeting Rogers informed the two men that because of the letter he had received from the Center he had to terminate them. Rogers further told them that there would be other jobs and he would put them back to work as soon as something materialized. According to Godwin's credited testimony, after Rogers informed Godwin and O'Connor that they were fired he asked them who they voted for in the ongoing mail ballot election. Godwin responded "the Brotherhood" whereas O'Connor replied "Local 238." Rogers then inquired as to whether they had already mailed their ballots and both men responded in the affirmative. Rogers then stated that if Local 238 won the election they would get their jobs back. He further commented that in new negotiations he was not giving up any more than he had already and before he did he would "just forget the place."

O'Connor was reemployed by the Respondent on 7 April. The judge found that between 5 April and 8 June the Respondent made no attempt to contact Godwin to offer him reemployment. On 8 June Rogers wrote a letter to Godwin offering him a job at United Cerebral Palsy (UCP). In response to the letter Godwin called the Respondent's office and spoke with Rogers' daughter, Barbara. Godwin informed Barbara that when he was first hired by the Respondent he made it clear he had an aversion to working with guard dogs and that since guard dogs were utilized at UCP he could not work there. Godwin refused the job offer and the Respondent thereafter did not offer him reemployment.

Upon review of the record we find insufficient evidence to support the judge's conclusion that the Respondent unlawfully refused to reemploy or reinstate Godwin because Godwin supported the Brotherhood rather than Local 238, the Union which General Counsel maintains the Respondent

[1] All dates refer to 1982 unless otherwise indicated.

[2] The third employee, Swain, worked at the Center on a part-time basis. After receiving the letter from the Center, Rogers informed Swain that he would no longer be assigned to that facility.

preferred. In reaching his conclusion, the judge relied on Rogers' unlawful statement regarding Local 238 winning the election and on Rogers' comment that in new negotiations he was not giving up any more than he already had. Since the Respondent already had a contract with Local 238, the judge construed Rogers' statement regarding "new negotiations" to mean "if the Brotherhood won the election and he had to negotiate with them." The judge, concluding that "these statements establish that Respondent favored Local 238 over the Brotherhood," found that Godwin was not reemployed by the Respondent because he informed Rogers that he had voted for the Brotherhood. We cannot accept the judge's analysis of the evidence bearing on this issue or the manner in which he construed Rogers' statements. The statement is ambiguous and thus susceptible to various interpretations, including a neutral interpretation that neither Local 238 nor the Brotherhood would get more from negotiations than had Local 238 under its current bargaining agreement. Accordingly we are not convinced that this statement evidenced an unlawful preference for one union as opposed to another. Further, we find that the sole remaining comment made by Rogers and relied on by the judge (i.e., incumbent Local 238 winning the election) does not serve the purpose of establishing that the Respondent unlawfully discriminated against Godwin. The comment was made after both Godwin and O'Connor were terminated and was directed to both individuals. In making the comment, Rogers did not differentiate between Godwin and O'Connor as to their opportunities for reemployment based on their personal union preferences.

The judge argued with respect to the 8 June offer of reemployment that the Respondent's secretary, Barbara, could have informed Godwin that dogs were no longer being used at UCP. In doing so, the judge ignored the fact that there is no evidence in the record that Barbara was aware that the use of dogs by UCP had been discontinued.[3] Further, Barbara was not alleged nor shown to be a supervisor of the Respondent and therefore her responsibility to inform Godwin of such details, if known, is questionable. Most importantly, Godwin refused the offer of reemployment.

We conclude that the General Counsel has failed to establish that the Respondent unlawfully discriminated against Godwin by refusing to reemploy him. In particular, the General Counsel failed to show that the Respondent treated Godwin in a disparate manner as compared to O'Connor. No evidence was submitted that Godwin should have been preferred over O'Connor for the Respondent's first available job opening on 7 April. The General Counsel also failed to submit any evidence that Godwin at any time following his lawful termination sought reemployment with the Respondent. Likewise, there is no evidence as to the results of the second election or whether any attempt by Godwin to seek reemployment would have been futile. Further, the General Counsel's argument that Godwin's preference for the Brotherhood was well known is rebutted both by Godwin's minimal union activity as outlined by the judge and by the fact that Godwin became the steward for Local 238 3 days before his discharge. Based on the record as a whole, we find that there is insufficient evidence either of discriminatory motivation on the part of Rogers or of a causal connection between any unlawful statements made by Rogers and the alleged refusal to reemploy Godwin. Accordingly, the applicable complaint allegation is dismissed.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Rogers Security Police, Inc., Bronx, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(c) and reletter the subsequent paragraph.
2. Delete paragraph 2(a) and reletter the subsequent paragraphs.
3. Substitute the attached notice for that of the administrative law judge.

[3] Despite the evident misunderstanding regarding the usage of dogs at UCP, the record does not support any finding that the position offered Godwin at UCP was made in bad faith given that dogs in fact were no longer used there.

[4] For reasons stated by the judge, Member Zimmerman would find that the Respondent violated Sec. 8(a)(3) and (1) by refusing to rehire Godwin.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate our employees regarding how they voted in an election conducted by the National Labor Relations Board.

WE WILL NOT condition the reemployment or reinstatement of our employees on Local 238, Security and Protective Employees' Union, SEIU, AFL-CIO winning the Board-conducted election, as compared to Brotherhood of Security Personnel Officers and Guards International Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

ROGERS SECURITY POLICE, INC.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard before me on January 13, 1983. The complaint, which issued on May 21, 1982, and was based on an unfair labor practice charge filed on April 7, 1982,[1] by Elton Godwin, alleges that Rogers Security Police, Inc. (Respondent), violated Section 8(a)(1) and (3) of the Act by discharging Godwin on April 5, and by refusing, thereafter, to reinstate him, and by conditioning the reemployment of its employees on the outcome of a then pending Board mail-ballot election, and by interrogating its employees regarding their union activities on the same date. Respondent denied these allegations.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York state corporation with its principal office located in Bronx, New York, is engaged in providing security services to various employers in the city of New York. One of these customers to whom Respondent provides such security services is the Bronx Developmental Center, the Center, a psychiatric and rehabiliation facility owned and operated by the State of New York, which itself is engaged in interstate commerce and meets a Board standard for the assertion of jurisdiction, exclusive of indirect inflow or outflow. Annually, Respondent provides guard services valued in excess of $50,000 to the Center. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Respondent admits, and I find, that Local 238, Security and Protective Employees' Union, Service Employees International Union, AFL-CIO (Local 238), and Brotherhood of Security Personnel Officers and Guards International Union (the Brotherhood), are each labor organizations within the meaning of Section 2(5) of the Act.

[1] All dates referred to herein relate to 1982 unless otherwise stated.

III. FACTS AND ANALYSIS

Pursuant to a petition filed by the Brotherhood and a Decision and Direction of Election issued by the Acting Regional Director for Region 2 of the Board, a secret-ballot election was conducted on January 22 among Respondent's employees employed at the Center. Based on timely objections to this election filed by Local 238, the Regional Director of Region 2 issued a Supplemental Decision and Direction of Second Election, pursuant to which a rerun mail ballot election was scheduled to be conducted from March 22 to April 13. The discharge and other unlawful actions alleged occurred on April 5; the only witnesses testifying at the hearing herein were Godwin and Morton Rogers, president of Respondent.

The General Counsel alleges that Respondent discharged and refused to reinstate Godwin because he supported the Brotherhood, rather than Local 238 which, he alleges, Respondent preferred over the Brotherhood. Respondent defends that it had no preference between the two unions and terminated Godwin from his employment at the Center because the Center dictated that it do so.

Godwin commenced his employment with Respondent in August 1981; he worked as a guard, with a post on the floor at the Center on the 4 p.m. to midnight shift; his job also entailed answering phones and patrolling the grounds; his immediate supervisor on the premises was James O'Connor Jr.

On March 30, James Shea, deputy director of administration for the Center, wrote the following letter to Respondent:

> Dear Mr. Rogers:
>
> Pursuant to our discussion on March 17, 1982, I am requesting that you terminate from this work location the following persons: James O'Connor, Jr.; Elton Godwin; and Kenneth Swain. The reasons for the terminations were discussed at length during our meeting, but I will summarize the reasons.
>
> On January 23, 1982, eight large corridor windows were observed shattered on the fourth floor of the J Building. The investigation of this damage lead to the conclusion that the above-named officers were on duty and were observed throwing a "bean-bag-like" object at 9:00 p.m. on Friday, January 22, 1982. It is my conclusion that this action or actions taken by the above caused the damage to the windows. The estimated cost of the damage exceeds $3,500.
>
> On February 26, 1982, James O'Connor, Jr., and Elton Godwin were observed carrying a typewriter through the J-4 corridor. Their explanation for their possession of the typewriter was less than acceptable, and the entry in the log did not adequately explain the possession. They were instructed to provide a detailed description of the incident, but did not provide this description. Also, that same evening, Mr. Swain's speech was slurred, and he appeared intoxicated.
>
> In addition, subsequent to our meeting, a typewriter was found at the loading dock area. Again,

> Mr. O'Connor was on duty when this discovery took place. Also, there have been intruders on the J-5 level, and those doors are monitored at the security desk. There has never been a report in the log that those doors were opened. Since those doors were put on the lock monitoring system, five (5) transcribers and two (2) typewriters have been stolen. It is apparent that the security personnel have not been doing their jobs.
>
> It is quite apparent that the lack of good and appropriate supervision has led to a number of problems. It is imperative that you provide better supervisors at this facility. Your immediate attention to better supervision and the termination of the abovenamed persons is necessary.

Rogers testified he received this letter on Friday, April 2 (even though the Center is located only a mile from Respondent's office); he testified that on either that day or Monday, April 5," I called [O'Connor] at the center that afternoon and told him to report in to the office Monday with Godwin."[2] When they reported to his office on the morning of April 5, he showed them the letter from Shea; he told them that due to the letter he had to terminate them,[3] but there would be other jobs, and as soon as something came in he would put them back to work. Rogers testified that during this meeting (which took about 20 minutes) he never questioned Godwin or O'Connor about unions or their preference in the election. He also testified that Shea had discussed the "beanbag incident" (discussed in the second paragraph of Shea's letter) with him in either late January or early February; at this meeting, Shea informed him that state investigators believed that the damages mentioned were caused by an air pistol. After this meeting with Shea (which took place at the Center), Rogers spoke to O'Connor[4] (who was the "supervisor" of Respondent's men at the Center) and told him that he should watch the men to be sure that nothing similar occurred again. As regards the effect of Shea's letter on Swain, Rogers testified that Swain only worked at the Center on weekends, so Rogers waited until Wednesday, April 7, when Swain came to Respondent's office to pick up his check, and, at that time, Rogers told him that he was being discontinued at the Center.

Godwin testified that between 10 and 11 a.m. on April 5, he received a telephone call at his home from O'Connor who informed him that he (Godwin) was fired, and Rogers wanted him (Godwin) to call him. Godwin immediately called Rogers and said that O'Connor informed him that he was fired, and he asked Rogers why he was fired; Rogers said that Godwin should come to his office, which he did that same morning. He, O'Connor, and Rogers met in Rogers' office, Godwin asked Rogers why he was fired, and Rogers showed him Shea's letter. Rogers read from the letter and repeated its accusations; Godwin denied any involvement in these incidents.[5] Godwin testified further "after he told us we're fired he asked us who we voted for"; Godwin told him that he voted for the Brotherhood and O'Connor said that he voted for Local 238. Rogers asked them if they had mailed in their ballots and they both said that they had. According to Godwin's testimony, Rogers then said that if Local 238 won the election they would get their jobs back. Rogers then told them that, in new negotiations, he would not give the employees more than they then had; he would "give the place up" before he did so. According to Godwin's testimony, this meeting took about 40 to 45 minutes; the first half encompassed a discussion of Shea's letter and the second half was a discussion of the unions.

Godwin testified, further, that when he and O'Connor left Respondent's office they went to the Local 238 office, where they met a representative of Local 238, whom Godwin described only as Neil. Neil spoke first and told them that there was nothing he could do for them and that they should not have gotten involved with the Brotherhood. Neil offered O'Connor a job (which he refused), but did not offer Godwin a job.

As stated, supra, the General Counsel also alleges that Respondent refused to reemploy or reinstate Godwin because he assisted the Brotherhood rather than Local 238; there is a major credibility issue in this regard as well. Rogers testified that on two occasions after Godwin was discharged, he asked his secretary to call Godwin to tell him that Respondent had worked for him. The first call occurred on about April 18; the second one was about 2 weeks later. On each of these occasions, Rogers heard his secretary dial the phone and ask to speak to Godwin; he then heard his secretary say: "Would you please have Mr. Godwin call the office that we have a job open for him." Godwin never called Respondent's office in answer to these telephone calls. During this period the Board was investigating the unfair labor practice charge filed by Godwin on April 7. Sometime shortly prior to June 8, Rogers had a conversation with the Board agent about offering reemployment to Godwin; the Board agent told him to put it in writing. On June 8, Rogers wrote the following letter to Godwin:

> We have a job open for you starting Monday night June 14, 1982, at 12 midnight to 8 am Tuesday morning for five nights a week, ending on Saturday Morning at 8 am.
>
> There will be another man working with you. The job is at United Cerebral Palsy, 1700 Stillwell Ave., Bronx, New York.
>
> Will you please let us know if you will accept this job by Friday June 11, 1982 by 12 Noon.

On April 20, Godwin returned to Respondent's premises where he returned his uniform and badge and, in exchange, received a check (signed by Roger's secretary) for $10. Rogers testified that he believed that his secre-

[2] Since Rogers testified that O'Connor and Godwin came to his office on April 5 about 10 a.m., it is reasonable to assume that he called O'Connor on April 2.

[3] He testified that he did not decide to terminate them—"This letter decided."

[4] Rogers first testified that he "spoke to the men" about the problem.

[5] Because of the nature of this matter, I find it unnecessary to repeat, at length, Godwin's explanation of his innocence regarding these incidents, and I make no finding in that regard.

tary gave Godwin the check; Godwin testified that it was neither Rogers nor his secretary who gave him the check; it was a man who was the only person present in the office at the time (he does not remember his name). Godwin further testified that after April 5 he received no messages or calls from Respondent's office offering him employment; nobody is home at his residence until 3:30 p.m.

In regard to the June 8 letter offer of reemployment at United Cerebral Palsy (UCP), Godwin testified that after receiving this letter he called Respondent's office and spoke with Rogers' daughter, Barbara, and told her that when he was first employed by Respondent he made it clear that he was afraid of dogs, and guard dogs were employed at UCP.[6] Godwin and Barbara began to argue and she told him to stay off the grounds at the Center;[7] Rogers' daughter then made a racially disparaging remark and Godwin told her "take the goddamn job and shove it." Admittedly, the June 8 letter was the final offer of reemployment.

Godwin testified that he knew there were dogs employed at UCP because at lunchtime (prior to their termination) he and O'Connor used to drive to that location. Rogers testified that there were dogs at UCP until May 24; Respondent rents guard dogs from a dog company and supplied them to UCP. He testified that on May 24 UCP discontinued the dogs, although he never discussed it with Godwin; Godwin testified that in his conversation with Rogers' daughter, after he received the June 8 letter, she did not tell him that there were no longer dogs on the UCP job.

Respondent obtained another job for O'Connor, where he worked 2 or 3 days a week; he did not like the job and asked Rogers to find a different job for him. At the end of 1982 Respondent placed O'Connor as the sole guard on a building in Riverdale that the Center is rehabilitating; this building is at a different location from the Center, and Rogers testified that he does not believe that Shea knows that O'Connor is working there. He testified he placed him there, "because the man has a car and how many men can you get with a car to go to work like that . . . it's out of the way." O'Connor works the midnight to 8 a.m. shift before the construction employees arrive. Godwin testified that on April 7 O'Connor informed him that he was back working for Respondent, but he did not like where he was working, and he told Rogers that if he could not work at the Center he would not work anyplace.

Respondent had a collective-bargaining agreement with Local 238 effective from December 1, 1981, through December 31, 1982, covering only its employees at the Center. Godwin, O'Connor, and the other guards at the Center began discussing the union situation seriously in about December 1981, when Neil regularly came to the Center to talk to them about Local 238. Later, after the Brotherhood had filed its petition, he, O'Connor, and the other guards discussed the Brotherhood, as well. Godwin signed an authorization card for Local 238 in about September 1981, and one for the Brotherhood in about December 1981. On April 2, there was a discussion at the Center in which Neil, Godwin, O'Connor, and four of the other guards at the Center were present. The previous shop steward had ceased his employment with Respondent. Neil asked Godwin to become the new shop steward for Local 238 and Godwin said that he would take the position if Neil renegotiated the contract with Respondent, which Neil agreed to do.

The General Counsel's case could clearly be described as bare bones. Godwin's union activity was minimal and there was no supporting testimony regarding the April 5 meeting with Rogers; credibility is therefore vital to the General Counsel's case. In that regard, I would credit Godwin's testimony over that of Rogers. Although Rogers did not appear to be totally incredible, I found him to be generally hostile to making any admissions, and he appeared to be structuring his testimony to best serve his case, whereas Godwin appeared to be open and freely willing to admit facts, even when it was harmful to his case.

I find that the General Counsel has not sustained his burden as set forth in *Wright Line*, 251 NLRB 1083 (1980), to establish that Godwin's discharge violated Section 8(a)(3) of the Act. That case requires, first, "a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." When Godwin and O'Connor came into Rogers' office on April 5, Rogers showed them the letter from Shea "requesting" that he terminate O'Connor, Godwin, and Swain, and there is no evidence that this letter was a fabrication or was inspired by Respondent. At the time, the Center represented approximately one-third of Respondent's total business so Respondent was in no position to resist Shea's request. Further, there is no evidence that Respondent was at that moment (i.e., prior to the interrogation), aware of Godwin's activities on behalf of, or support of, the Brotherhood,[8] minimal as they were. Finally, both Godwin and O'Connor were terminated at the same time, although, when Rogers later asked them which union they voted for, O'Connor told him that he had voted for Local 238, the alleged favored union. I therefore dismiss the allegation that Respondent terminated Godwin on April 5 in violation of Section 8(a)(1) and (3) of the Act.

The more troublesome issue is whether Respondent unlawfully refused to reemploy Godwin after April 5. Within 2 days Respondent located another job for O'Connor. Rogers testified that about April 18 it located a job for Godwin, and left messages at his home for him to call Respondent, but he failed to do so. Godwin testi-

[6] Godwin testified that after being employed by Respondent for awhile, Joe Slaughter (position unstated) asked him to work at UCP for a few days; Godwin told Slaughter that he could not because he was afraid of dogs. Godwin also testified that by June Slaughter was no longer employed by Respondent.

[7] Godwin testified that an incident occurred in about early May, when he went to the Center to meet a woman friend who was employed there. While he was standing at the security desk in the lobby, Rogers' daughter told him to get off the grounds or she would call the police.

[8] I generally discount the significance of Godwin's testimony of the content of his meeting (together with O'Connor) with Neil on April 5 as establishing Respondent's knowledge of his sympathies for the Brotherhood; it is too indefinite to serve this purpose.

fied that his home was never called by Respondent after April 5. On the basis of all the facts, I would discredit Rogers regarding Respondent's alleged attempts to contact Godwin to inform him of a job offer. In this regard, I find especially critical Godwin's visit to Respondent's premises on April 20 when he returned his uniform and pin to Respondent's office and received a check for $10 in return. It appears to me that if Respondent were really serious about reemploying Godwin, Rogers or his secretary would have remained at the office or, at the least, would have left a note for Godwin when he arrived on that day, informing him of the job that was available to him. It was only two days after Rogers' secretary allegedly left a message for Godwin to call and Respondent knew that Godwin would be at the office on April 20, since the check was waiting for him. However, not only did Respondent fail to tell him about the available job on this occasion, it took a positive step to diminish the credibility of its position that it was attempting to reemploy him—it returned his $10 deposit to him, rather than attempting to stop him from turning in his uniform and pin and remaining available for employment with Respondent.

Further reinforcing this view is the June telephone conversation between Godwin and Rogers' daughter where she told him to stay off the grounds at the Center. Rather than expressing this animus towards him, if Respondent really were attempting to reemploy him, she would have told him of other jobs that were, or would be, available or, if Rogers testimony were true, she could have told him that dogs were no longer employed at UCP.

Having found that Godwin was discriminated by Respondent by not being reemployed, it is necessary to determine the reason for the discrimination. I have credited Godwin, and I therefore find that on April 5 (after he terminated them) Rogers told Godwin and O'Connor that if Local 238 won the upcoming election they would get their jobs back, and in new negotiations he would not give the employees more than they then had; that he would "give the place up" rather than doing so. Since he then had a contract with Local 238, "new negotiations" meant if the Brotherhood won the election and he had to negotiate with them. These statements establish that Respondent favored Local 238 over the Brotherhood. I therefore find that O'Connor was reemployed by Respondent because he informed Rogers that he had voted for Local 238, whereas Godwin was never reemployed by Respondent, or offered reemployment by Respondent, because he informed Rogers that he voted for the Brotherhood. Respondent's failure and refusal to reemploy Godwin therefore violates Section 8(a)(1) and (3) of the Act.[9]

In addition, Rogers' interrogation of Godwin and O'Connor on how they voted in the election, and his statement to them that if Local 238 won the election they would get their jobs back, violated Section 8(a)(1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondent, described above in section III, above, occurring in connection with Respondent's operation described above in section I, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 238 and the Brotherhood are each labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by:

(a) Interrogating its employees regarding how they voted at the Board-conducted mail-ballot election.

(b) Conditioning the reemployment of its employees upon Local 238 winning the Board conducted mail-ballot election.

4. The Respondent violated Section 8(a)(1) and (3) of the Act by failing and refusing to reemploy, or offer to reemploy, Godwin.

5. There is insufficient evidence to establish that Respondent violated Section 8(a)(1) and (3) of the Act when it terminated Godwin on April 5.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent unlawfully failed and refused to reemploy Elton Godwin, I shall recommend that Respondent be ordered to offer him immediate and full reemployment to a substantially equivalent job, without prejudice to his seniority or other rights and privileges, and to make him whole, from April 7, 1982 (the date Respondent first reemployed O'Connor), for any loss of earnings suffered as a result of the discrimination by payment of a sum equal to that which he would have earned, absent the discrimination, with backpay and interest computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing & Co.*, 138 NLRB 716 (1962).

[9] It should be noted that I reject the request of the General Counsel, as stated in his brief, that because Respondent did not call O'Connor to testify to corroborate Roger's testimony, "an inference can be drawn that O'Connor's testimony would not have been favorable to Respondent," citing *Publishers Printing Co.*, 233 NLRB 1070 (1977). In that case, the missing witnesses were supervisors within the meaning of the Act. In the instant matter, there is no evidence that O'Connor was a statutory supervisor on April 5 and it is reasonably clear that he was not a statutory supervisor at the time of the hearing, as he was the sole guard at his location.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Rogers Security Police, Inc., Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees regarding how they voted in a Board conducted election.

(b) Conditioning the reemployment of its employees upon Local 238 winning the Board-conducted election.

(c) Failing and refusing to reemploy Elton Godwin because he supported and voted for the Brotherhood, rather than Local 238.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act.

(a) Offer Elton Godwin full and immediate reemployment to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay suffered as a result of the discrimination against him, in the manner set forth above in the section entitled "The Remedy."

(b) Post at its principal office in Bronx, New York, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges that Goodwin was discharged in violation of the Act.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."